(22)

Supreme Court, U.S.
FILED
DEC - 8 2004
OFFICE OF THE CLERK

No. 03-1693

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL.,

Petitioners,

V.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS AND OHIO SENATOR BILL HARRIS IN SUPPORT OF PETITIONERS

PETER W. SCHRAMM
EXECUTIVE DIRECTOR,
ASHBROOK CENTER FOR
PUBLIC AFFAIRS
401 College Ave
Ashland, OH 44805
(419) 289-5413

SENATOR BILL HARRIS
PRESIDENT-ELECT,
OHIO SENATE
Ohio Statehouse
Columbus, OH 43215
(614) 466-8086

STEVEN C. SEEGER
Counsel of Record
LARRY J. OBHOF
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000
(312) 861-2200 Facsimile

Counsel for Amici Curiae

December 8, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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BRIEF OF AMICI CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS AND OHIO SENATOR BILL HARRIS IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE1

The Ashbrook Center for Public Affairs ("Ashbrook Center") is an educational organization located at Ashland University in Ashland, Ohio. For over twenty years the Ashbrook Center has taught the meaning and significance of America by providing a forum for the study, research, and discussion of the principles and

[1] This brief is filed with the written consent of petitioners, and in accordance with the global consent letter filed by respondents with this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

practices of the American government. Consistent with this mission, the Ashbrook Center advocates the defense of individual liberty, limited constitutional government, and civic morality. The Ashbrook Center has a strong interest in protecting the historical courthouse displays in McCreary County and Pulaski County, both as educators and as advocates of the defendants' constitutional right to post public displays containing the Ten Commandments.

Senator Bill Harris represents Ohio's 19th Senate District and is President-Elect of the Ohio Senate. As a government actor, Senator Harris recognizes the pivotal role that the Ten Commandments played in the shaping of our nation. He therefore joins the Ashbrook Center in urging this Court to uphold the constitutionality of the courthouse displays in McCreary County and Pulaski County, Kentucky. Many government buildings across the country, including some in Ohio, feature displays containing the Ten Commandments. Senator Harris recognizes that the lower courts are divided over whether and when displays containing the Ten Commandments are permissible. He supports the petitioners because he believes that the courthouse displays at issue here do not violate the Establishment Clause.

SUMMARY OF THE ARGUMENT

The plaintiffs have failed to allege an injury sufficient to confer standing. The complaints in the district court failed to allege in concrete terms that any of the plaintiffs actually saw the courthouse displays. Plaintiffs alleged only that they "have occasion" to view the Ten Commandments, and thus failed to allege a concrete and particularized injury. Additionally, plaintiffs have alleged only that they are offended by the government's action because they believe that it is unconstitutional. That is insufficient injury to establish standing under Article III.

Assuming *arguendo* that the plaintiffs have alleged an injury sufficient to confer standing, the courthouse displays in McCreary County and Pulaski County did not violate the Establishment Clause. In fact, the courthouse displays easily pass constitutional muster under the test set out by this Court in *Lemon v. Kurtzman*. The McCreary County and Pulaski County courthouses included the Ten Commandments in historical displays about the origins and development of American law and government. In each

display, the Ten Commandments appeared inconspicuously among a series of other historical documents. All of the other documents or symbols in each display were purely secular. Each display included a thematic explanation, informing viewers that the display included documents that affected the American system of law and government. Each display was only one of many historical displays throughout each courthouse, which present hundreds of different documents and demonstrate the defendants' commitment to illustrating the heritage of America and the Commonwealth of Kentucky.

Defendants offered a legitimate secular purpose for the displays – celebrating the foundations of our legal system and government – and this secular purpose was entitled to deference. The Sixth Circuit clearly erred in finding that the purpose was a sham, and applied an erroneous legal standard by requiring defendants to demonstrate a predominantly secular purpose for the displays. The Sixth Circuit also misapplied governing law and gave undue weight to the alleged unconstitutionality of earlier displays at the courthouses.

The inclusion of the Ten Commandments in the courthouse displays did not have the effect of promoting religion. No reasonable observer could conclude that the government endorsed religion simply by including the Ten Commandments in a diverse display about the history of American law and government. In each courthouse, the Ten Commandments appeared on a single piece of paper, and were surrounded by other documents that played a role in the development of the law and in our nation's history and heritage, such as the Magna Carta and the Declaration of Independence. This Court has permitted displays containing even purely religious symbols, such as nativity scenes, so long as the display as a whole does not have the effect of endorsing religion. That principle is even more applicable here, where the displays emphasized the secular impact of the Ten Commandments on American law and presented them in a way that was historically accurate. Nothing in the Establishment Clause or this Court's jurisprudence requires the omission of the Ten Commandments from a historical presentation about the origins of American law.

ARGUMENT

I. Plaintiffs Have Not Alleged Sufficient Injury to Establish Article III Standing.

As an initial matter, plaintiffs have not alleged a sufficient injury to confer standing under Article III. Although the parties did not raise the issue of standing before the Sixth Circuit, this Court will raise the issue of standing *sua sponte* when it appears that plaintiffs have failed to allege an injury in fact. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-231 (1990) ("Although neither side raises the issue [of standing] here, *we are required to address the issue* even if the courts below have not passed on it . . . and even if the parties fail to raise the issue before us.") (emphasis added).[2]

As a voluntary membership organization, the American Civil Liberties Union ("ACLU") has standing to bring a case *if* there is an alleged injury to one of its members. A voluntary membership organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The question remains, however, whether the individuals on whose behalf the ACLU has brought suit, or any of the named plaintiffs, have standing to sue in their own right. Plaintiffs here have failed to allege an injury sufficient to confer standing under Article III.

In order to satisfy the "case or controversy" requirement under Article III, a plaintiff must demonstrate (1) that he or she has

[2] When defending a prior set of displays before the district court, defendants unsuccessfully argued that the plaintiffs lacked standing to pursue these actions because they had not alleged "injuries in fact." *See ACLU of Kentucky v. Pulaski County*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000); *ACLU of Kentucky v. McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) ("*McCreary I*"). The district court's brief analysis of the issue did not address the arguments put forth by *amici* above.

suffered an "injury in fact;" (2) a causal relationship between the injury and the challenged conduct; and (3) that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (internal quotations omitted). Mere allegation of "injury" will not suffice – the injury must be "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998).

Plaintiffs here have failed to allege a "concrete" or "actual" injury. In their complaints, plaintiffs made vague assertions regarding *potential* injuries *possibly* occurring during their performance of various civic duties. The language in the complaints is noticeably general and oblique, without a clear statement that any plaintiff actually saw the disputed displays:

> [Plaintiffs] must use their courthouse to transact civic business, such as obtaining and renewing licenses, registering property, paying local taxes and registering to vote. When transacting this civic business, they *have occasion* to view the Ten Commandments display in their courthouse.

Complaint at ¶ 15, *McCreary I*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507) (emphasis added); Complaint at ¶ 15, *Pulsaki County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509) (emphasis added). Plaintiffs then expressed their personal views about the constitutionality of the displays: "Each plaintiff perceives this Ten Commandments display as a violation of the Constitution . . . . Each plaintiff therefore is offended by the continued display and by having to view this display when transacting civic business in the [McCreary and Pulaski] County courthouse[s]." Complaint at ¶ 19, *McCreary I*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint at ¶ 19, *Pulsaki County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509). Plaintiffs' sworn verifications (attached to the complaints

pursuant to 28 U.S.C. § 1746) added no information, but merely asserted that the allegations were true.

The complaints did not allege in straightforward terms that the plaintiffs actually saw either display, but rather claimed that they "have occasion" to view the displays when visiting the courthouses. Does the phrase "have occasion" mean that the plaintiffs have the *opportunity* to view the Ten Commandments? Does it mean that they *may* see the displays at some indefinite point in the future? That they definitely *will* see the displays when they eventually fulfill their civic duties? The complaints before district court were so impossibly vague and non-descript that no one can know for certain. Whatever it means, however, such amorphous allegations are not sufficient to establish standing. "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.

The complaints were facially inadequate because no plaintiff specifically claimed to have visited either courthouse, let alone to have actually seen the displays. Plaintiffs claimed that they "must use" the courthouses, but did not even claim to have fulfilled the civic duties (*e.g.*, paying taxes) that allegedly required their presence at the buildings. Not a single plaintiff stated that these civic duties – if they *had* been fulfilled – would have required him or her to go into an area of a courthouse where either of the displays was posted. Presumably, if any of the plaintiffs had seen the displays, the complaints could have said so in plain, unambiguous language. Plaintiffs' vague, generalized, and uncertain claims were not "concrete," and they did not allege any "particularized" or "actual" injury. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. Alleging a concrete injury is a duty of each plaintiff who seeks relief in federal court, and the murky language in the complaints simply does not suffice under Article III.

Plaintiffs' lack of standing was not cured by the consolidated amended complaint, curiously filed a month *after* the district court rendered its decision. The only material change in the amended complaint (for purposes of standing) is the assertion that "[w]hen transacting this civic business," several of the plaintiffs "have *had*

occasion" to view the displays. *See* Consolidated Amended Complaint at ¶¶ 28, 29, *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845 (E.D. Ky. 2001) ("*McCreary II*") (Case Nos. 99-507, 99-508, 99-509). This belated attempt by plaintiffs to establish past injury, rather than speculative future injury, underscores the insufficiency of the original complaints. Even so, the amended complaint still fails to meet the requirements of Article III. Like its predecessors, the amended complaint fails to allege that any particular plaintiff actually saw one of the displays. The nuance between "have occasion" and "have had occasion" is a distinction without a difference because neither statement sets forth a sufficiently concrete or particularized injury. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103.

In addition to the lack of a firm factual nexus between plaintiffs and the disputed conduct, the proffered basis for the alleged injury is plainly insufficient. The complaints offered the following assertion of an injury:

> Each believes in the "separation of church and state" . . . . Each plaintiff believes that religious freedom can best be preserved if government remains strictly neutral towards religion . . . . Each plaintiff perceives this Ten Commandments display as a violation of the Constitution . . . . Each plaintiff therefore is offended by the continued display . . . .

Complaint at ¶¶ 16-19, *McCreary I*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint at ¶¶ 16-19, *Pulsaki County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509).

Such "injuries" do not confer standing. "This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982) (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962) (internal citation omitted)); *see also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-22 (1974); *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *Ex parte Levitt*, 302 U.S. 633, 634 (1937). It is clear that the Article III requirements

of standing "are not satisfied by 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.'" *Valley Forge*, 454 U.S. at 482 (quoting *Schlesinger*, 418 U.S. at 223 n.13); *see also id.*, 454 U.S. at 485-86 (holding that plaintiffs "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees," and that "[t]hat is not an injury sufficient to confer standing under Art[icle] III, even though the disagreement is phrased in constitutional terms").

II. The Constitution Does Not Prohibit the Inclusion of the Ten Commandments in Historical Displays on Government Property.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court articulated a flexible framework for evaluating whether governmental conduct passes muster under the Establishment Clause.[3] The *Lemon* test requires a court to determine that (1) the challenged government action has a secular purpose; (2) the action's primary effect neither advances nor inhibits religion; and (3) the action does not foster an excessive entanglement with religion. *Id.* at 612-13. A governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The Sixth Circuit affirmed the district court on the basis of the first prong. Judge Clay, writing only for himself, suggested that the courthouse displays would violate the second prong as well. Each conclusion is incorrect.

The Sixth Circuit's determination regarding the purpose of the courthouse displays is clearly erroneous and is based on an incorrect legal standard directly at odds with the prior decisions of this Court. Judge Clay's determination regarding the effects prong

[3] *Amici* join Judge Ryan in doubting the continued efficacy of the *Lemon* test, which, as he noted in dissent, has been criticized by six current members of this Court. *See McCreary III*, 354 F.3d at 464 (Ryan, J., dissenting). Nonetheless, *amici* recognize that *Lemon* was controlling on the lower courts in this case, and believe that the courthouse displays survive a properly-applied analysis under *Lemon*.

is also incorrect, and relies upon an improper application of governing law. Including the Ten Commandments in a historical display about the foundations of secular law and institutions does not have the purpose or effect of promoting religion, and does not violate the Establishment Clause.

A. The Courthouse Displays Had a Secular Purpose.

1. The Sixth Circuit Applied an Erroneous Legal Standard in its Analysis of the Defendants' Purpose for Posting the Courthouse Displays.

The Sixth Circuit applied an erroneous legal standard when it concluded that the courthouse displays lacked a secular purpose. According to the panel, "[t]o satisfy this prong of the *Lemon* test, Plaintiffs must show that Defendants' *predominate* purpose for the displays was religious." *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 446 (6th Cir. 2003) ("*McCreary III*") (emphasis added); *see also id.* at 447 ("We agree . . . that the predominate purpose of the displays was religious."); *id.* at 454 ("[T]he district court correctly concluded that Defendants' *primary* purpose was religious.") (emphasis added). This "predominate purpose" or "primary purpose" standard is not the correct standard, and is neither required nor permitted by this Court's decisions.

Government action will be invalidated under the purpose prong only if it is entirely motivated by a religious purpose. In *Lynch v. Donnelly*, this Court held that the purpose prong of the *Lemon* analysis is satisfied so long as the government can articulate "a" secular purpose. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded there was no question that the statute or activity was motivated *wholly by religious considerations*." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). This Court has reiterated the rule from *Lynch* a number of times. In *Wallace v. Jaffree*, for example, the Court stated that an action violates the first prong of *Lemon* only where the action is "*entirely* motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (emphasis added). The courts may invalidate a statute or government action "only if it is motivated *wholly* by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (emphasis added).

This Court has found a secular purpose for governmental action in a host of prior cases. Most notably, this Court upheld the display of a nativity scene (with Santa Claus and other secular symbols) in *Lynch*, 465 U.S. at 681. "Almost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter." *Edwards*, 482 U.S. at 613 (Scalia, J., dissenting). *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 485-486 (1986); *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985); *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-124 (1982); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 654, 657 (1980); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (plurality opinion); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-480, n. 7 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-679 (1971) (plurality opinion); *Lemon*, 403 U.S. at 613. In the few cases where this Court has struck down laws under the Establishment Clause for lack of secular purpose, it has done so only where the government's *sole* purpose was to promote religion, or the proffered secular purpose was so overshadowed by the religious purpose that it was tantamount to no secular purpose at all. *See Edwards*, 482 U.S. at 585 ("appellants have identified no clear secular purpose"); *Wallace*, 472 U.S. at 56-57, 60; *Stone v. Graham*, 449 U.S. 39, 41(1980) (finding that "Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had *no* secular legislative purpose") (emphasis added); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968); *see also Lynch*, 465 U.S. at 680 (describing *Stone* and *Epperson* as cases in which this Court invalidated laws "motivated wholly by religious considerations").

The Sixth Circuit was unable to conclude that the displays were motivated by wholly religious considerations. Instead, the court applied its own erroneous "predominate purpose" standard, which the court derived from its incorrect reading of Justice O'Connor's concurrence in *Lynch*. In *Lynch*, Justice O'Connor

stated that the secular purpose requirement is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). "The proper inquiry," according to Justice O'Connor, "is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691.

The Sixth Circuit has relied on Justice O'Connor's concurrence for the proposition that defendants' actions violate the Establishment Clause where their primary purpose is non-secular. *See McCreary III*, 354 F.3d at 446, 447, 454; *see also ACLU of Ohio v. Ashbrook*, 375 F.3d 484, 491 (6th Cir. 2004); *Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002). That is not the standard articulated by this Court in *Lynch*, 465 U.S. at 680, *Wallace*, 472 U.S. at 56, or *Bowen*, 487 U.S. at 602. Nor does it adequately capture the statements made by Justice O'Connor in *Lynch*. It is one thing to find, as the Sixth Circuit did in this case, that "Defendants' primary purpose was religious." *McCreary III*, 354 F.3d at 454. It is something altogether different to find that defendants' actions were "dominated by religious purposes," or were intended to endorse religion. *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). As explained below, including the Ten Commandments as part of a larger historical display does not evince an intent to endorse religion.

2. The Content and Context of the Displays Demonstrate a Secular Purpose.

The defendants articulated a legitimate secular purpose for including the Ten Commandments in a historical display about the origins of law and government. This secular purpose for displaying the Ten Commandments closely parallels the legitimate purpose for displaying religious symbols recognized by this Court in *Lynch*. If the Constitution permits the inclusion of a religious symbol to depict the origins of Christmas, then surely the Constitution permits the inclusion of a religious symbol to depict the origins of our secular law.

The defendants maintained that their purpose was to display documents that impacted the development of American law and government. Consistent with that secular purpose, the displays exhibited foundational historical documents and patriotic texts and

symbols, including: (1) the Star Spangled Banner; (2) the Declaration of Independence; (3) the Mayflower Compact; (4) the Bill of Rights; (5) the Magna Carta; (6) the National Motto; (7) the Preamble to the Kentucky Constitution; (8) the Ten Commandments; and (9) Lady Justice. *McCreary III*, 354 F.3d at 443. The displays also included a document that provided an explanatory theme, entitled "The Foundations of American Law and Government Display." That document explained that the displays "contain[] documents that played a significant role in the foundation of our system of law and government." *Id.*

The displays also included an explanation concerning the inclusion of the Ten Commandments, and firmly placed the Decalogue in the context of secular traditions:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

McCreary III, 354 F.3d at 443 (citation omitted). The displays did not draw undue attention to the Ten Commandments and did not emphasize the religious nature of the Decalogue.

In the district court, the defendants articulated the animating reasons for the displays and for the inclusion of the Ten Commandments. The defendants explained that the displays were intended, among other things, to illustrate "that the Ten Commandments were part of the foundation of American Law and Government;" to provide the "moral background of the Declaration of Independence and the foundation of our legal tradition;" and to "educate the citizens of the county regarding some of the documents that played a significant role in the

foundation of our system of law and government." *McCreary III*, 354 F.3d at 446-47.

The validity of displaying the Ten Commandments in this manner flows naturally from this Court's decision in *Lynch v. Donnelly*. In *Lynch*, this Court recognized a valid secular purpose for including a nativity scene – an indisputably religious symbol – in a holiday display with Santa's house and sleigh, reindeer, candy-striped poles, and the like. This Court did not evaluate the nativity scene in isolation, but rather considered the entire display as a whole. When "viewed in the proper context," the inclusion of a religious symbol with secular symbols did not evince an intent to promote religion. *Lynch*, 465 U.S. at 680. Importantly, this Court also validated the inclusion of a religious symbol because it depicted the origins of the holiday:

> The City . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. . . . The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

Id. at 680-81.

Like the nativity scene in *Lynch*, the Ten Commandments appeared in the context of broader displays that predominantly included secular documents and symbols. The Ten Commandments also reflected the "historical origins" of the law in a clear, unmistakable manner. If the Constitution permits the display of a crèche to celebrate and reflect the origins of Christmas, then surely the Constitution permits the display of the Ten Commandments to celebrate and reflect the origins of the law.

3. The Sixth Circuit Incorrectly Applied Controlling Precedent from this Court.

The government's assertion of a legitimate secular purpose is entitled to deference, unless the proffered purpose is merely a sham. *Edwards*, 482 U.S. at 586-87; *see also Wallace*, 472 U.S. at

74 (O'Connor, J., concurring). The Sixth Circuit and district court found that the defendants' stated purpose in posting the displays was a "sham," and concluded that the defendants included the Ten Commandments for predominantly religious reasons. *See McCreary III*, 354 F.3d at 446-47; *McCreary II*, 145 F. Supp. 2d at 848-49. The Sixth Circuit rested its holding on a misapplication of this Court's precedent.

The Sixth Circuit gave insufficient weight to the full context of the displays. The court barely mentioned the fact that approximately 90% of each display was purely secular, or that the title of the displays, "Foundations of American Law and Government Display," evinced a secular purpose. The court also gave little weight to the explanatory signs that accompanied the displays, which specifically stated the permissible secular purpose of presenting documents that impacted American law and government. Rather than focusing on the overall context of the displays as a whole, the Sixth Circuit "plainly erred by focusing almost exclusively" on the Ten Commandments. *Lynch*, 465 U.S. at 680; *see id.* (noting that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause").

Although the Sixth Circuit noted that the displays did not unduly emphasize the Ten Commandments, the court nevertheless rejected defendants' proffered secular purpose because of the "blatantly religious" content of the displays. *McCreary III*, 354 F.3d at 455. In its attempt to distinguish *Lynch*, the Sixth Circuit seemingly held that the Ten Commandments are different in kind than a nativity scene, at least for constitutional purposes: "The displays do not present a 'passive symbol' of religion like a crèche, which, when accompanied by secular reminders of the holiday season, has come to be associated more with the public celebration of Christmas, rather than that holiday's religious origins." *Id.*

The Sixth Circuit clearly misstated the holding in *Lynch*. The Court in *Lynch* did not approve the display of a nativity scene *despite* the "holiday's religious origins," as the circuit court suggested. *McCreary III*, 354 F.3d at 455. To the contrary, the *Lynch* Court squarely held that acknowledging the "origins" of the holiday was a valid secular purpose, even if those origins were

religious. This Court upheld the display of the crèche in *Lynch* specifically because "celebrat[ing] the Holiday and . . . *depict[ing] the origins of that Holiday* . . . are legitimate secular purposes." *Lynch*, 465 U.S. at 681 (emphasis added).

The court of appeals also incorrectly applied *Lynch* to the facts of this case. The crèche upheld in *Lynch* – a nativity scene including the figures of Jesus, Mary, Joseph, angels, shepherds, and kings – was neither more passive nor more secular than the Ten Commandments. Unlike the Ten Commandments, the crèche is a purely religious symbol. *See Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (noting that the crèche is "an unarguably religious symbol"). The *Lynch* Court upheld the government's display of the crèche, even though its sectarian significance was not negated by the setting, because the defendant had served a legitimate secular purpose by "tak[ing] note of a significant historical religious event long celebrated in the Western World." *Lynch*, 465 at 680.

If anything, the principle in *Lynch* is even more compelling when applied to this case. The Ten Commandments are *not* purely religious, and played a significant role in the development of secular law and institutions. *See, e.g., Edwards*, 482 U.S. at 593-94 (stating that the Ten Commandments did not play an exclusively religious role in the history of Western civilization); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., concurring) (stating that most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions . . . reinforce commands of the decalogue."); *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."). In any event, the Decalogue is certainly not *more* sectarian than the figures of Mary, Joseph, and Jesus in the nativity display permitted in *Lynch*, or the 18-foot Chanukah menorah upheld in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

The Sixth Circuit also gave excessive weight to selected quotations from this Court's decision in *Stone v. Graham*, 449

U.S. 39 (1980), which rejected a Kentucky statute requiring the posting of the Ten Commandments, *standing alone*, in all public schoolrooms. The circuit court relied on *Stone* for the proposition that the Ten Commandments, unlike the nativity scene upheld by this Court in *Lynch*, are an "active symbol of religion" because several of the Commandments allegedly concern only the religious duties of believers. *McCreary III*, 354 F.3d at 455 (citing *Stone*, 449 U.S. at 42). In particular, the court referenced the Commandments mandating "worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* (quoting *Stone*, 449 U.S. at 42).

Nothing in *Stone* requires the omission of the Ten Commandments from a historical display. In fact, the *Stone* Court expressly noted that the Ten Commandments could be "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization . . . or the like." *Stone*, 449 U.S. at 42. That observation readily applies to the displays at issue here. The Ten Commandments did not appear alone, but rather were integrated with secular documents in an educational display about secular law. In any event, a finding that the Decalogue necessarily has *some* religious purpose is clearly not the same as a finding that it serves a *wholly* religious purpose, *see Lynch*, 465 U.S. at 680, or that the government intends to convey a message of endorsement. *See id.* at 691 (O'Connor, J., concurring). Following *Stone*, this Court reiterated that the Ten Commandments can serve both religious *and* secular purposes. "[*Stone*] did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards*, 482 U.S. at 593-94.

The Sixth Circuit's conclusion that several Commandments concern only the "religious duties of believers" is questionable, if not demonstrably false. While the Commandments themselves concern religious duties, that does not mean that they cannot serve a legitimate secular purpose within the context of a broader historical display. The Sixth Circuit failed to address the historical evidence cited by the defendants in their initial appellate brief, which noted that "[t]welve of the thirteen original colonies adopted the *entire* Decalogue into their civil and criminal laws."

Initial Brief of Appellants at 19, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935). Defendants also offered examples of the enactment into law of *each* Commandment by one or more of the colonies or states. *See id.* at 20-30. The Sixth Circuit simply failed to confront the evidence of the role that the first four Commandments played in the development of American law. That error is critical when one considers that defendants' stated secular purpose was to post a historical display presenting significant influences on American law. Indeed, as Judge Batchelder recently noted in dissent from another Sixth Circuit case with nearly identical facts, the "oft-repeated truism that the first three or four Commandments are 'exclusively religious' is simply not true. Including these rules as part of a historical display about the development of American law is accurate, appropriate . . . and legally permissible." *See Ashbrook*, 375 F.3d at 507 (Batchelder, J., dissenting). Even putting aside this historical debate, the Sixth Circuit clearly gave undue emphasis to four of the Ten Commandments, which comprised less than half of one document in a much larger overall display.

4. The Sixth Circuit Erroneously Scrutinized the Historical Accuracy of the Displays.

Rather than focusing on the full context of the displays, the Sixth Circuit scrutinized the accuracy of the prefatory description of the Ten Commandments, which stated, in relevant part:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

McCreary III, 354 F.3d at 451.

According to the court, this explanation presented two problems. First, the court stated that "the evidence [that the Ten Commandments influenced Western legal thought] does not appear in the actual display . . . so an observer would not actually be made aware of these facts." *Id.* at 452. This is wholly

irrelevant to the question of defendants' *purpose*. Whether an observer is aware of the historical connection between the Ten Commandments and the law is a completely separate question from what defendants' motivations were in posting the displays. Indeed, this Court upheld the display of a crèche in *Lynch* without requiring any explanatory documents whatsoever. *See Lynch*, 465 U.S. at 671.[4] Nothing in this Court's case law requires any explanatory sign at all – let alone the extensive historical exegesis required by the Sixth Circuit in this case – in order to demonstrate defendants' purpose. Whether the displays could have been more thorough, or could have better explained the impact of the Ten Commandments, is completely distinct from the question of whether the displays were motivated by a religious purpose.

Second, the court went to great lengths to demonstrate that the Ten Commandments did not inspire the drafting of the Declaration of Independence. *See McCreary III*, 354 F.3d at 452-53. The Sixth Circuit repeatedly noted the lack of a "single historical source in support of the proposition that the Ten Commandments inspired the drafting of the Declaration of Independence." *Id.* at 453. That claim, however, was not made in either display. The displays made a much more modest assertion, stating only that the Ten Commandments provided the "moral background" of the Declaration and of our legal tradition. Nor would it be dispositive if the explanatory documents *had* made the claims of which they were accused. Even assuming *arguendo* that the Sixth Circuit's reading of history is correct, the accuracy of the displays is a separate and distinct issue from the defendants' purpose in posting them. As its moniker indicates, the "purpose prong" of the *Lemon* test focuses on defendants' motivations, not on the relative educational merits of viewing the displays. Indeed, as Judge Ryan noted in dissent, "the source of Thomas Jefferson's 'belief in divinely bestowed unalienable rights' proclaimed in the Declaration of Independence is utterly immaterial, because it does

[4] This Court's failure to require an explanatory plaque in *Lynch* was certainly not because the Court had not considered the issue. Indeed, in his dissent from *Lynch*, Justice Brennan suggested that he would have required such a document. "[T]he City has done nothing to disclaim government approval of the religious significance of the crèche . . . Pawtucket has made no effort whatever to provide a . . . cautionary message." *Lynch*, 465 U.S. at 706-07.

not resolve the real issue before us today, which is whether the defendants' avowed secular purposes are shams." *Id.* at 468 (Ryan, J., dissenting). The issue before the court was whether the government posted the displays for the sole purpose of endorsing religion. The answer to that question is "no."

5. The Sixth Circuit Erred in Finding that the "Evolution" of the Displays Demonstrates a Non-Secular Purpose.

Both the district court and the court of appeals made much of the fact that the defendants changed the content of the displays several times, ostensibly for the purpose of making them permissible under the Establishment Clause. Because the initial displays consisted of the Ten Commandments standing alone, the courts inferred that the earlier displays had "imprinted the defendants' purpose . . . with an unconstitutional taint." *McCreary III*, 354 F.3d at 457 (quoting *McCreary II*, 145 F. Supp. 2d at 850). According to the court of appeals, this permanent taint "strongly indicate[s] that the primary purpose was religious." *Id.* at 458.

The lower courts' assumption of unconstitutional "taint" is simply not supported by the case law. The Sixth Circuit relied heavily on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), for the proposition that prior noncompliance with the Establishment Clause had to be considered in determining whether the defendants' courthouse displays were constitutional. *See McCreary III*, 354 F.3d at 455-56. Nothing in *Santa Fe*, however, requires the result reached by the circuit court. Although the *Santa Fe* majority considered the text and history of the school policy at issue in that case, the Court also made clear that the policy was, in fact, invalid on its face. "[T]he text of the [] policy *alone* reveals that it has an unconstitutional purpose." *Santa Fe*, 530 U.S. at 314 (emphasis added).

The factual differences between the policy at issue in *Santa Fe* and the displays at issue here are so great as to render any comparison irrelevant. In *Santa Fe*, the plaintiffs challenged a school district practice that permitted students to deliver invocations and benedictions at graduation ceremonies and at football games. In the face of litigation, the district altered the

policy several times, ultimately arriving at a policy that permitted students to vote on whether they wanted to have a student-led "invocation and/or message" at football games, and if so, who should give the invocation or message. *See id.* at 298 and n.6. The policy remained substantially unchanged from its original version. In this case, however, the displays at issue have changed significantly. Initial displays consisted of only framed copies of the Ten Commandments. *McCreary II*, 145 F. Supp. 2d at 846. A second set of displays added secular documents, such as excerpts from the Congressional Record, which contained references to the role of religion in American life. *See McCreary I*, 96 F. Supp. 2d at 684. After the district court enjoined those displays, *id.* at 691, defendants posted additional displays, ultimately arriving at the "Foundations of American Law and Government Displays." The current displays contain numerous secular documents – without religious references – and are accompanied by explanatory documents setting forth their secular purpose. They bear little resemblance to their predecessors. Whereas the final policy analyzed by this Court in *Santa Fe* was little more than a recycled version of earlier unconstitutional policies, the displays at issue here are significantly different from the initial courthouse displays and do not evince a facially religious purpose.[5]

Under the *McCreary* analysis, the government can seemingly never cure the unconstitutionality of its prior conduct. This simply cannot be the case, unless we are to assume that all constitutional violations continue in perpetuity. "[G]overnmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from,

[5] The Sixth Circuit also incorrectly applied that circuit's own case law regarding the effects of past conduct. The court relied heavily upon selected quotes from *Adland v. Russ*, 307 F.3d at 480, for the proposition that defendants' earlier policies or practices demonstrate a non-secular purpose for defendants' present actions. *See McCreary III*, 354 F.3d at 456. In contrast to the *McCreary* panel, however, the *Adland* court specifically stated that the defendants *could cure their constitutional defects by changing the composition of the display*: "While we cannot pass on the merits [of proposals to amend the display], we are nevertheless confident that with careful planning and deliberation . . . the Commonwealth can permissibly display the monument in question." *Id.* at 490. The *McCreary* court not only ignored this language but in fact incorrectly relied on *Adland* for the opposite conclusion.

practices that are contrary to law." *ACLU of Kentucky v. McCreary County*, 361 F.3d 928, 933 (2004) (Boggs, C.J., dissenting). Indeed, for exactly this reason, the Third Circuit, Seventh Circuit, and (before this case) the Sixth Circuit have explicitly rejected such arguments. *See ACLU of New Jersey v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose . . . .") (quotation omitted); *Granzeier v. Middleton*, 173 F.3d 568, 574 (6th Cir. 1999) (holding that the state defendants could continue with the Good Friday holiday closing by adopting a secular rationale for the closing); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995) (same). As the Sixth Circuit itself stated in *Granzeier v. Middleton*, "the fact that a particular [policy] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Granzeier*, 173 F.3d at 574.

This Court's jurisprudence also undermines the inference of an improper religious intent based on prior conduct. In *McGowan v. Maryland*, 366 U.S. 420 (1961), a group of defendants charged with violating Maryland's "Sunday closing laws" challenged the laws as an unconstitutional establishment of religion. This Court acknowledged that "the original laws which dealt with Sunday labor were motivated by religious forces," *id.* at 431, but nevertheless upheld the laws because they had later taken on a secular purpose. The *McGowan* Court explicitly rejected the reasoning that underlies the Sixth Circuit's theory of "unconstitutional taint."

> The present purpose and effect [of Sunday closing laws] is to provide a uniform day of rest for all citizens . . . . To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because . . . such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare . . . .

Id. at 445.

The lower courts' imputation of unconstitutional taint is also incongruous with this Court's holding in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Although that case was decided on the "effects" prong of the *Lemon* analysis, it is instructive in the present discussion of purpose as well. The *Allegheny* Court invalidated the government's display of a crèche on a courthouse staircase but allowed the public display of an 18-foot menorah as part of a larger display in front of the city-county building. As the Third Circuit has pointed out, "not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building." *Schundler*, 168 F.3d at 105 n.12. If a display is not tainted by a contemporaneous unconstitutional display, then surely a display is also not tainted by a materially dissimilar prior display.

B. Including the Ten Commandments in the Courthouse Displays Did Not Have the Effect of Endorsing Religion.

The Sixth Circuit limited its holding to the conclusion that the defendants had a non-secular purpose for posting the Ten Commandments, and did not reach the effects prong of the *Lemon* test. *See McCreary III*, 354 F.3d at 462 (Gibbons, J., concurring) ("I express no opinion as to whether the displays violate the 'effect/endorsement' prong of the *Lemon* test."); *id.* at 479 (Ryan, J., dissenting) ("[T]he opinions of my brother, Judge Clay, on this issue, are his own and do not represent those of the majority of the panel."). The courthouse displays survive scrutiny under the effects prong as well because no reasonable observer could conclude that the inconspicuous inclusion of the Ten Commandments in a historical display amounted to government endorsement of religion.

In evaluating the effects prong of the *Lemon* test, courts apply the "endorsement test" first articulated by Justice O'Connor in her concurring opinion in *Lynch*, *see* 465 U.S. at 690, and later embraced by this Court's decision in *Allegheny*. The key question is whether a "reasonable observer" would conclude that the government had endorsed religion by allowing the challenged practice. *See Allegheny*, 492 U.S. at 592-94; *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). While there is always someone who

might perceive a particular action as an endorsement of religion, that person does not personify the reasonable observer. "A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Pinette*, 515 U.S. at 780; *see also Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (stating that "the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort") (quoting *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring)). To the contrary, a court's analysis of the display must be grounded "in reality," *see Lynch*, 465 U.S. at 678, and must avoid "a stilted over-reaction contrary to our history and to [this Court's] holdings." *Id.* at 686.

A reasonable observer could not conclude that the government endorsed religion by including the Ten Commandments in broad historical displays about the foundations of American law and government. In each of the displays, the Ten Commandments appeared on a single, normal-sized sheet of paper. Each display also included the text of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, a printed image of Lady Justice, and an explanatory sign identifying the foregoing documents and stating that the display presented "documents that played a significant role in the foundation of our system of law and government." *McCreary III*, 354 F.3d at 443. As the Sixth Circuit recognized, "the displays did not provide undue physical emphasis to the Ten Commandments. . . . [they] appeared on a single piece of paper, the same size as that containing the secular documents." *Id.* at 454.

Visitors to either courthouse encounter several other large historical displays which provide additional context to the displays at issue here. In the McCreary County courthouse, there are *hundreds* of historical documents displayed throughout the building, including 58 in the judge's office, 41 in the waiting room, 124 near the side entrance to the courthouse, 33 in the fiscal courthouse, and 28 in the conference room. *See* Initial Brief of Appellants at 7, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935). The Pulaski County courthouse posted similar

displays throughout the building. *Id.* Visitors to either courthouse pass numerous other displays which demonstrate to observers the defendants' strong commitment to illustrating the rich historical heritage of both America and the Commonwealth of Kentucky. The Ten Commandments simply do not confront visitors to either courthouse in a manner that could lead a reasonable non-adherent to question his or her standing in the political community. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

The district court's orders in this case put the defendants in a no-win situation. Prior displays were enjoined because they allegedly focused too much on religion, and the religious message was not sufficiently diluted by purely secular documents. *See McCreary I*, 96 F. Supp. 2d at 689. The present displays were enjoined, however, specifically because the Ten Commandments were surrounded by purely secular documents and symbols:

> The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents. . . . The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement.

McCreary II, 145 F. Supp. 2d at 851. Judge Clay adopted this reasoning in its entirety. *See McCreary III*, 354 F.3d at 459.

No display containing the Ten Commandments could survive scrutiny under these shifting standards. A display that is not sufficiently diluted by secular documents will be too religious, *McCreary I*, 96 F. Supp. 2d at 689, but a display that incorporates secular documents will "accentuate[] the religious nature of the Ten Commandments." *McCreary III*, 354 F.3d at 459 (quoting *McCreary II*, 145 F. Supp. 2d at 851). Applying these contradictory rules enabled the lower courts to effectively establish a per se rule against *any* display containing the Ten Commandments – a rule explicitly rejected by this Court. *See Edwards*, 482 U.S. at 593-94 ("[*Stone*] did not mean that no use

could ever be made of the Ten Commandments . . . ."); *Lynch*, 465 U.S. at 678 ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."). This has not gone unnoticed even by other judges sitting in the same district where this case originated: "[N]either the Constitution nor *Stone* impose such a would-be constitutional straightjacket . . . for governments legitimately wishing to display a document having great secular influence on the development of our laws . . . ." *ACLU of Kentucky v. Mercer County*, 219 F. Supp. 2d 777, 791 (2002).

The government does not *endorse* religion by *acknowledging* the role of religion and religious symbols in secular society. Like the nativity scene in *Lynch*, the display of the Ten Commandments at issue here did not endorse religion. In *Lynch*, this Court held that a nativity scene, surrounded by secular objects and symbols, did not confer a substantial and impermissible benefit on religion. *See Lynch*, 465 U.S. at 681-82. The Court approved its inclusion in the broader holiday display, "notwithstanding the religious significance of the crèche." *Id.* at 687. In her concurrence, Justice O'Connor found "clearly erroneous" the district court's holding that "the City's use of an unarguably religious symbol 'raises an inference' of intent to endorse." *Id.* at 691 (O'Connor, J., concurring). Even though the sectarian significance of the nativity was *not* negated by the setting, the composition of the overall display made the government's use of the crèche no more an endorsement of religion than such acknowledgments of religion as legislative prayers or the opening of court sessions with "God save the United States and this honorable court." *Id.* at 693 (O'Connor, J., concurring). The same principle should apply here, where the Ten Commandments were posted along with numerous secular documents and the composition of the overall displays did not endorse religion.

This Court's decision in *County of Allegheny v. ACLU* also supports the conclusion that a reasonable observer would not perceive the courthouse displays as a government endorsement of religion. In *Allegheny*, this Court allowed the public display of an 18-foot menorah as part of a larger "Salute to Liberty" display. *See Allegheny*, 492 U.S. at 582. In doing so, this Court specifically noted that the menorah has both religious and secular

significance: "The menorah, one must recognize, is a religious symbol . . . But the menorah's message is not exclusively religious." *Id.* at 613. Like the menorah in *Allegheny*, the Ten Commandments are "not exclusively religious," but rather have both religious and secular aspects, and were presented as parts of larger displays that emphasized their secular impact on our society. The principle derived from *Allegheny* is even more compelling in the present case. The 18-foot menorah permitted by this Court was accompanied by a Christmas tree and a sign saluting liberty. In the courthouse displays, the Ten Commandments were accompanied by many more secular documents and symbols, all linked by a common secular theme that was clearly spelled out in their title and explanatory documents.[6]

This Court has upheld numerous other governmental policies and acknowledgements of religion that provide far greater benefit to religion than any incidental benefit from the displays here. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (upholding a school voucher program even though majority of participating students had enrolled in religiously-affiliated schools); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (upholding a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools); *Witters*, 474 U.S. 481 (upholding a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state); *Mueller*, 463 U.S. 388 (upholding a program authorizing tax deductions for educational expenses even though 96% of the beneficiaries were parents of children in religious schools); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (allowing non-categorical grants to church-

[6] The inclusion of the Ten Commandments in the courthouse displays was unlike the display of the nativity scene rejected by this Court in *Allegheny*. The Court invalidated the government's display of a crèche *standing alone* on a courthouse staircase because "nothing in the context of the display detracts from the crèche's religious message." *Allegheny*, 492 U.S. at 598. That is completely inapposite to the present case, where the Ten Commandments were included in a much larger display that emphasized their role in the development of secular institutions.

sponsored colleges and universities); *Tilton*, 403 U.S. 672 (permitting federal grants for college buildings of church-sponsored institutions); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding tax exemptions for church properties); *Board of Education v. Allen*, 392 U.S. 236 (1968) (permitting the expenditure of public funds for textbooks supplied to students attending church-sponsored schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (allowing the expenditure of public funds for transportation of students to church-sponsored schools). Surely there is no greater aid to religion deriving from the historical displays in the McCreary County and Pulaski County courthouses than from these policies that do not violate the Establishment Clause. *See also Lynch*, 465 U.S. at 681-82. Any benefit to religion from the courthouse displays was "indirect, remote and incidental," and therefore constitutional. *See id.* at 683.

It would be patently unreasonable to conclude that the courthouse displays "send[] a message to nonadherents that they are outsiders, not full members of the political community." *Id.* at 688 (O'Connor, J., concurring). The courthouse displays did not compel belief or acquiescence, or command participation in any form of religious exercise. They did not assert a preference for one religious denomination over others, or promote religion over non-religion, or involve the state in the governance of any church. *See ACLU of Ohio v. Capitol Square Review and Advisory Board*, 243 F.3d 289, 299-300 (6th Cir. 2001); *see Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2333 (2004) (Thomas, J., concurring) (stating that a policy comports with the Constitution where "the State has not created or maintained any religious establishment" and the policy "does not expose anyone to the legal coercion associated with an established religion"). Far from promoting one religion over another, or promoting religion over non-religion, the purpose of the displays was merely to illustrate historical documents that played a significant role in the development of American law and government. The Decalogue undeniably *was* one such influence. *See, e.g., McGowan*, 366 U.S. at 462 (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions . . . reinforce commands of the decalogue."). The Establishment Clause surely does not require the omission of

religious material from a historical narrative, especially when the religious material indisputably played a role in the development of secular institutions.

III. Conclusion.

Justice Goldberg found it necessary to remind us more than 40 years ago that "[n]either government nor this Court can or should ignore the significance of the fact that . . . many of our legal, political and personal values derive historically from religious teachings." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Plaintiffs here would have this Court do exactly that. Fortunately, "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part) (quoting *Lynch*, 465 U.S. at 678)).

Petitioners Jimmie Greene and Darrell BeShears displayed small, unobtrusive copies of the Ten Commandments in their courthouses, as part of a series of documents and symbols that were accurately described as significant influences on the development of our law and government. The Establishment Clause does not require the omission of religious material from a historical narrative or preclude any mention of religious influences on our legal and political heritage. It is not, and has never been, unconstitutional to make observations of historical fact or to acknowledge the role played by religion in civic life. The Sixth Circuit erroneously determined that including the Ten Commandments in a secular historical display evidenced an intent to establish religion, and should be reversed.

Respectfully submitted,

PETER W. SCHRAMM
EXECUTIVE DIRECTOR,
ASHBROOK CENTER FOR
PUBLIC AFFAIRS
401 College Ave
Ashland, OH 44805
(419) 289-5413

SENATOR BILL HARRIS
PRESIDENT-ELECT,
OHIO SENATE
Ohio Statehouse
Columbus, OH 43215
(614) 466-8086

STEVEN C. SEEGER
Counsel of Record
LARRY J. OBHOF
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000
(312) 861-2200 Facsimile

Dated: December 8, 2004